

Congress of the United States
Washington, DC 20515

Additional Views to H.R. 5825, the “Electronic Surveillance Modernization Act”

We could not support H.R. 5825, the “Electronic Surveillance Modernization Act,” because of the wholesale changes the legislation would make to our existing regime of domestic electronic surveillance and the impact these changes would have on the expectations of privacy shared by each United States citizen.

Instead, we offered a bipartisan amendment in the nature of a substitute to ensure that the Government has all the tools necessary and all the authority required to pursue al Qaeda and other terrorists who would seek to harm our country. Our amendment also stood for the principle that administrative burden and load, as we use all the tools available to fight terrorism, should not supersede devotion to the Constitution and the expectation of privacy of each United States citizen.

While the President possesses the inherent authority to engage in electronic surveillance of the enemy outside the country, Congress possesses the authority to regulate foreign intelligence surveillance within the United States. Congress has indeed spoken in this area through the Foreign Intelligence Surveillance Act (FISA). When Congress passed FISA, it intended to provide the sole authority for such surveillance on American soil. Our amendment would have reinforced this existing law – that the government must obtain a court order when U.S. persons are targeted or surveillance occurs in the United States.

Our bipartisan substitute also responded to the issues that have been raised by officials at the NSA and the Department of Justice over the last several months in testimony to Congress. First, the proposal made clear that foreign-to-foreign communications are outside of FISA and don’t require a court order. If a communication to which a U.S. person is a party is inadvertently intercepted, minimization procedures approved by the AG should be followed.

Second, our amendment provided an extension of the FISA emergency exception from 72 hours to 168 hours, or seven days. This permits law enforcement to initiate surveillance in an emergency situation before going to the FISA court for a warrant. If the current 72 hours has been sufficient in the 5 years since September 11th, surely 7 days can be considered a significant improvement. Importantly, this authority can be used to thwart imminent attacks.

Third, our amendment expanded the FISA “wartime exception” to provide that in addition to a “declaration of war” by Congress, that an “authorization for the use of military force” can also trigger the FISA “wartime exception” for purposes of allowing 15 days of warrantless surveillance if there is an explicit provision authorizing electronic surveillance under that FISA provision.

Finally, our amendment streamlined the FISA application process, provided authorization to appoint additional FISA judges and additional personnel at DOJ, the FBI, and the NSA, to ensure speed and agility in the drafting and consideration of FISA order applications.

Electronic surveillance of al Qaeda operatives and others seeking to harm our country must continue; it simply can and should comply with FISA. We believe our substitute accomplished these joint goals.



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